2000

American Fork City v. Robert Thomas Luttmer : Brief of Appellee

Utah Court of Appeals

James "Tucker" Hansen; Bruce R. Murdock; Duval, Hansen, Witt & Morley; Attorneys for Appelle.
L. Ronald Jorgensen; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, by and through the American Fork City prosecutor, Plaintiff/Appellee, vs. ROBERT THOMAS LUTTMER, Defendant/Appellant.	Case No. 20000035-CA Priority No. 2

BRIEF OF APPELLEE

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, AMERICAN FORK DEPARTMENT, BEFORE THE HONORABLE HOWARD H. MAETANI, FROM CONVICTIONS OF POSSESSION OF DRUG PARAPHERNALIA IN A DRUG FREE ZONE, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5, AND INTERFERENCE WITH A PEACE OFFICER MAKING AN ARREST, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-8-305

L. RONALD JORGENSEN
Attorney at Law
12116 Aspen Ridge Road
Sandy, Utah 84094

Attorney for Appellant

JAMES "TUCKER" HANSEN (5711)
BRUCE R. MURDOCK (6948)
Duval Hansen Witt & Morley, P.C.
306 West Main Street
American Fork, Utah 84003
Telephone: 801-756-7658

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutory Provisions

Cases Cited

JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1953 as amended).

STANDARD OF REVIEW FOR ISSUES PRESENTED

When reviewing a jury verdict on an insufficiency of the evidence claim, this Court reviews the evidence in the light most favorable to the verdict, and will reverse only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he was convicted. State v. Brown, 948 P.2d 337, 343 (Utah 1997); State v. Hawkins, 967 P.2d 966, 971 (Utah App. 1998).

CONTROLLING STATUTORY AND CONSTITUTIONAL PROVISIONS

UTAH CODE ANN. § 58-37a-5(1) (1953 as amended)

> (1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

UTAH CODE ANN. § 58-37a-3(10) (1953 as amended)

> As used in this chapter:
>
> "Drug paraphernalia" means any equipment, product, or material used, or intended for use, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, conceal, inject, ingest, inhale, or to otherwise introduce a controlled substance into the human body in violation of Title 58, Chapter 37, and includes, but is not limited to:
>
> (10) Containers and other objects used, or intended for use to store or conceal a controlled substance.

UTAH CODE ANN. § 76-8-305 (1953 as amended)

A person is guilty of a class B misdemeanor if he has knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by:

(1) use of force or any weapon;

(2) the arrested person's refusal to perform any act required by lawful order:

(a) necessary to effect the arrest or detention; and

(b) made by a peace officer involved in the arrest or detention; or

(3) the arrested person's or another person's refusal to refrain from performing any act that would impede the arrest or detention.

STATEMENT OF THE CASE

A. Nature of the Case

Defendant appeals his convictions of Possession of Drug Paraphernalia in a Drug Free Zone, a class A misdemeanor, in violation of Utah Code Ann. § 58-37a-5, and Interference With a Peace Officer Making an Arrest, a class B misdemeanor, in violation of Utah Code Ann. § 76-8-305, after a jury trial held November 16, 1999, the Honorable Howard H. Maetani presiding.

B. Trial Court Proceedings and Disposition

Defendant was charged by an information filed September 15, 1998 with Possession of a Controlled Substance Within a Drug Free Zone, a class A misdemeanor, Possession of Drug Paraphernalia Within a Drug Free Zone, a class A misdemeanor, Assault, a class B misdemeanor, and Interference With a Peace Officer Making an Arrest, a class B misdemeanor. (R. at 5). Defendant filed a Motion to Suppress Evidence on March 31, 1999. (R. at 29). A hearing was held on the motion on September 22, 1999, after which Defendant's motion was denied by the trial court. (R. at 40-41). The State filed an amended information on November 16, 1999, amending the Assault charge to Disorderly Conduct. (R. at 53). A jury trial

was held on November 16, 1999 after which Defendant was convicted of Possession of Drug Paraphernalia in a Drug Free Zone, and Interference With a Peace Officer Making an Arrest. (R. at 81-84).

STATEMENT OF RELEVANT FACTS

On August 28, 1998 at approximately 7:30 p.m., American Fork City police officers were dispatched the American Fork Recreation Center on a complaint of a man following a young girl in the swimming pool area. Partial Trial Transcript (hereafter "Tr.") at 30. Upon arriving at the recreation center, the officers encountered the complainant, Michael Peterson, and the individual complained of, Defendant Robert Thomas Luttmer. (Tr. at 30, 60). Mr. Peterson had been blocking Defendant's path and preventing him from leaving the center.

Officer Darren Falslev separated the two individuals and spoke with the complainant. (Tr. at 60, 80). Officer Tony Weinmuller and Officer Cory Smith spoke with Defendant and attempted to identify him. (Tr. at 30-31, 60-61, 80-82). Defendant was reluctant to give his personal information, but provided his name and stated that he was staying with friends in Lehi, but did not know the address. (Tr. at 30-31, 81). Defendant also stated that he did not have any identification on his person. (Tr. at 81). The officers asked Defendant what he was doing at the recreation center and how he got there. (Tr. at 31, 81). Defendant indicated that he was swimming at the recreation center and then provided conflicting statements regarding how he had traveled to the recreation center. (Tr. at 60, 81). The officers continued to attempt to obtain identification from Defendant and Officer Smith asked Defendant for permission to look in his gym bag for identification. (Tr. at 32). Defendant granted Officer Smith permission to look in the bag. Id.

Officer Smith looked in the bag and found a Ford vehicle key in the pants pocket of a pair of jeans that was in the bag. Id. Upon locating the key, Officer Smith asked Defendant about the key and Defendant stated that it would open a white Ford truck that was in the recreation center's parking lot. Id. Defendant then stated he had a Georgia driver's license in the truck and asked the officers if they wanted him to go get it. Id. Defendant then led the three officers to the truck. (Tr. at 32-33, 61, 82). As they were walking to the vehicle, Officer Smith asked Defendant if there was anything illegal in the truck, such as guns or drugs. (Tr. at 33). Defendant paused for a minute, then stated there were no guns. Id. Officer Smith again asked Defendant if there was anything illegal in the truck and Defendant again stated that there were no guns in the truck. Id.

When the officers and Defendant arrived at the truck, Defendant opened the truck's door, whereupon the officers immediately smelled a strong odor of marijuana coming from inside the truck. (Tr. at 34, 61, 82). Defendant had climbed into the driver's seat and Officer Falslev asked Defendant where the marijuana was. (Tr. at 35, 61, 83). Defendant did not respond, but sat silent as though he was contemplating his next move. (Tr. at 35, 61-62, 83). The officers again asked Defendant where the marijuana was and received no response from Defendant. (Tr. at 35, 62). Defendant then suddenly reached under the seat. (Tr. at 35, 62, 83-84). Officers Smith and Falslev yelled at Defendant to stop and show his hands. (Tr. at 35-36, 49-50, 62-63, 84). Defendant continued to reach under the seat in a sudden manner that caused the officers to be concerned for their safety. (Tr. at 36, 63, 84). Specifically, the officers were concerned that Defendant was reaching for a weapon. (Tr. at 63, 84). The officers repeatedly yelled at Defendant to stop and show his hands, but Defendant did not comply. (Tr. at 36, 49-50,

62-63, 72, 84).

When Defendant did not obey the officers' commands to stop reaching under the seat and show his hands, Officers Smith and Falslev took hold of Defendant and pulled him out of the truck. (Tr. at 36, 50-51, 63, 84, 90). Defendant fell to the ground on top of Officer Weinmuller, whose feet had become tangled with someone else's. (Tr. at 85). This took place in the small space between parked vehicles, which made it difficult for the officers to gain control over Defendant. (Tr. at 51, 90). Defendant struggled and fought with the officers as the officers attempted to handcuff Defendant. (Tr. at 36-37, 52-54, 63, 74, 84-85). In spite of the officers' commands to stop struggling, Defendant continued to fight the officers. (Tr. at 36-37, 63). It took all three officers to physically restrain Defendant and handcuff him. (Tr. at 37, 63, 85). Defendant continued to struggle even after being handcuffed. (Tr. at 63).

Officer Smith looked under the seat to see what Defendant was reaching for and found a red box. (Tr. at 37). The inside of the box smelled strongly of marijuana. (Tr. at 38). On the day of trial, the box still smelled of marijuana, almost one and a half years later. Id. Officer Smith then performed a search of the truck with his K-9 and found three marijuana roaches in a dashboard cut-out area of the truck. (Tr. at 39-41). The truck was located in the recreation center parking lot, making it a drug free zone. (Tr. at 42).

Officer Falslev read Defendant his Miranda rights and Defendant agreed to talk to Officer Falslev. (Tr. at 64-65). Defendant stated that when he opened the truck and smelled the marijuana, he knew that he was "screwed." (Tr. at 65). Defendant further stated that he could not remember the last time he smoked marijuana. Id. When Officer Falslev asked him if it was that day, Defendant replied, "I couldn't say." Id. When Officer Falslev asked Defendant why he

continued to struggle with the officers instead of comply, he stated, "I guess it is kind of like when your brother tries to bend your arm behind your back and you just fight back." Id.

Defendant produced a Georgia driver's license for himself that he kept inside the truck, (Tr. at 85-86), and there was testimony by Defendant's brother that Defendant had driven the truck that day and that he used it on a regular basis. (Tr. at 109-13). Also, Defendant's brother testified that Defendant kept his important papers in the truck. (Tr. at 108).

SUMMARY OF ARGUMENT

Defendant has failed to marshal the evidence in order to make a proper claim for insufficiency of the evidence. Instead, Defendant describes fragmented and selected portions of the evidence in making his argument, which is inadequate to satisfy his burden on appeal. Also, the evidence Defendant does cite is not presented in the light most favorable to the jury verdict, nor does Defendant demonstrate how it is insufficient to support the verdict, which is required for him to successfully claim that the evidence was insufficient to convict him.

In any event, sufficient evidence was presented to the jury to convict Defendant of Possession of Drug Paraphernalia in a Drug Free Zone and Interference With an Officer Making an Arrest. Drug paraphernalia was found in a truck that Defendant drove on a regular basis. He had driven the truck that day and was in possession of the key to the truck when the police encountered him in the recreation center. Further, Defendant kept his identification and personal papers in the truck. Therefore, the jury had sufficient evidence to find that Defendant constructively possessed the drug paraphernalia. Also, there was sufficient evidence presented to the jury to show Defendant's intent to use the drug paraphernalia. The circumstances together with evidence found at the scene and Defendant's statements were sufficient to infer Defendant's

intent to use the box as drug paraphernalia.

Sufficient evidence was presented to the jury to convict Defendant of Interference With an Officer Making an Arrest. Defendant was told by the officers to stop reaching under the seat and to show his hands on more than one occasion, but he refused. The officers then physically took hold of Defendant and pulled him out of the truck because they feared for their safety. Defendant fought with the officers continually as they attempted to handcuff him. Even after Defendant was handcuffed, he continued to struggle. Clearly, the evidence was sufficient to support Defendant's conviction for interfering with his own arrest or detention by using force or refusing to comply with a lawful order made by a peace officer involved in the arrest or detention.

ARGUMENT

POINT I

DEFENDANT HAS NOT MARSHALED THE EVIDENCE

Defendant argues that the evidence was insufficient to convict him at trial on both charges that he was convicted of. According to State v. Vessey, 967 P.2d 960 (Utah App. 1998),

> In challenging the sufficiency of the evidence, the burden on the defendant is heavy. Defendant "must marshal all evidence *supporting* the jury's verdict and must then show this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict."

Id. at 966 (quoting State v. Lemons, 844 P.2d 378, 381 (Utah App. 1992)) (italics in original).

In State v. Hopkins, 1999 UT 98, 989 P.2d 1065 (Utah 1999), the Utah Supreme Court declined to treat Hopkins' contention that the evidence was insufficient because he failed to marshal the evidence and meet his burden on appeal in this regard. Id. at 1070. Hopkins had described only fragmented and selective portions of the evidence in making his argument. Id.

In the instant case, Defendant does the same as Hopkins, and refers only to fragmented and selective portions of the evidence presented in making his arguments. In regards to Defendant's possession of drug paraphernalia conviction, he does not address Defendant's statements to the police officers, both before and after arrest, the fact that the box that smelled of marijuana was found under the truck's seat in the area Defendant was reaching for, that the box smelled of marijuana the day of trial, which was more than one year after it was found, or that the three marijuana roaches were found in proximity to the box. Furthermore, Defendant does not present all evidence that supports the jury verdict and demonstrate that it is insufficient when viewed in the light most favorable to the verdict, which is required.

In regards to Defendant's conviction for interference with an officer making an arrest or detention, Defendant does not address the clear evidence that he was being detained by the police officers when they ordered him to show his hands, and then physically removed him from the truck when he did not obey, or that Defendant struggled with the officers when they took hold of him and continued to struggle even after being handcuffed.

Defendant has failed to meet his burden. Consequently, because Defendant has failed to marshal the evidence that was presented in support of his conviction, this Court should refuse to address his insufficiency of the evidence arguments.

POINT II

SUFFICIENT EVIDENCE WAS PRESENTED FOR THE JURY TO CONVICT DEFENDANT OF POSSESSION OF DRUG PARAPHERNALIA IN A DRUG FREE ZONE

This Court reviews the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the jury verdict. State v. Hawkins, 967 P.2d 966, 971 (Utah

App. 1998) (quoting State v. Hamilton, 827 P.2d 232, 236 (Utah 1992)). Applying this standard to the instant case, it is clear that there was sufficient evidence presented to the jury to convict Defendant of Possession of Drug Paraphernalia in a Drug Free Zone.

There is no dispute that the location where the paraphernalia was found was within a drug free zone. Defendant first argues that the evidence was insufficient to show that he constructively possessed the paraphernalia. According to State v. Layman, 1999 UT 79, 985 P.2d 911 (Utah 1999), the test is "whether there was evidence of a sufficient nexus between the defendant and the drugs or paraphernalia to permit a factual inference that the defendant had the power and the intent to exercise control over those drugs or paraphernalia." Id. at 914. In this case, there was clearly sufficient evidence presented to show such a nexus.

The paraphernalia was found in a truck that Defendant had driven that day. Defendant had the truck's key in his pants pocket when the officers first confronted him at the recreation center. No other persons were in the truck with Defendant when the paraphernalia was found. Defendant used the truck on a regular basis and kept his important papers in the truck, including his driver's license. Defendant led the officers directly to the truck when they were seeking to obtain identification from him. Furthermore, Defendant acted suspiciously at all times he was involved with the police, and fought with them when they were forced to physically restrain him. Clearly, there was sufficient evidence presented to the jury to find that Defendant constructively possessed the paraphernalia that was found in the truck.

This case presents significantly more evidence showing constructive possession than was present in State v. Salas, 820 P.2d 1386 (Utah App. 1991). In Salas, this Court reversed a jury verdict finding Salas guilty of possession of a controlled substance on a constructive

possession theory. In Salas, police officers received a tip from a confidential informant that Salas would be in possession of cocaine during his lunch hour. Id. at 1386. The officers stopped Salas as he drove his vehicle with two passengers inside. One passenger was in the front passenger seat and the other was in the back seat. Id. at 1387. The passenger in the back seat moved from the driver's side to the passenger side just before the stop. Id. at 1388. The officers asked Salas if there was cocaine in the car and Salas answered "no," and consented to a search of the car because he "didn't have anything to worry about." Id. at 1387. After a lengthy search, the officers found a package containing cocaine in the crack of the backseat on the driver's side, where the bottom of the cushion fits the back. Id. This Court reversed Salas' jury conviction for possession, holding that the evidence of his constructive possession of the cocaine was insufficient.

The Court listed several facts in support of its decision. Specifically, that Salas' ownership of the vehicle was joint, together with his wife, and that there were other occupants of the vehicle when it was searched. Also, the cocaine was found in a place where one of the passengers had better access to it than Salas, and it was not easily accessible to Salas. Further, Salas denied the presence of cocaine before the search, did not try to escape the scene during the search, denied putting the cocaine in the vehicle after it was discovered, and had no contraband on his person at the time of his arrest. Id. at 1389.

In the instant case, unlike Salas, Defendant was the sole occupant of the truck at the time the paraphernalia was discovered, and it was readily accessible to Defendant. Indeed, Defendant was reaching in the area the paraphernalia was found at the time the officers became concerned for their safety. Also unlike Salas, Defendant never denied the presence of drugs in the

truck, even though he was asked by Officer Smith if drugs were present. Defendant further never denied ownership of the paraphernalia or that he used it as paraphernalia. Defendant's actions at all times were suspicious and he fought with the police after it was obvious that he was caught, unlike the defendant in Salas. The evidence presented by this case was sufficient to show a nexus between Defendant and the contraband such that the jury could properly find him in constructive possession.

Defendant's next argument is that there was insufficient evidence to show that he intended to use the box as drug paraphernalia. Utah Code Ann. § 58-37a-3(10) (1953 as amended) states that a container can be drug paraphernalia. According to State v. Murphy, 674 P.2d 1220 (Utah 1983), an ordinary object such as a paper clip may be drug paraphernalia if it is used to ingest a controlled substance, even though that is not its ordinary purpose. Id. at 1223. In the instant case, the box found in Defendant's truck that smelled strongly of marijuana inside of it can be paraphernalia if it is used as a container to store drugs. Sufficient evidence was presented to the jury to show that the box contained marijuana at some time. Furthermore, Defendant's intent to use the box as paraphernalia can be inferred from the actions of Defendant and the surrounding circumstances. Id.

In this case, the evidence showed that the box smelled strongly of marijuana. It was found in Defendant's truck in close proximity to three marijuana roaches. Defendant acted at all times as though he knew he was guilty of an offense related to the marijuana and made statements to that effect. Specifically, when Officer Smith first asked Defendant if he had any guns or drugs in the truck, Defendant said that he didn't have a gun, but did not address the question of whether he had drugs. Officer Smith asked again, and Defendant made the same

reply. When in the truck, Defendant did not respond to the officers' questions about the marijuana but sat silent as if he were contemplating his next move. Then, he reached suddenly under the seat where the box was found, and continued to reach under the seat even after being ordered by the officers to stop. Then, he struggled and fought with the officers when they took hold of him to physically arrest him. Finally, when Officer Falslev questioned Defendant after his arrest, Defendant stated that he knew that he was "screwed" when he opened the truck door and smelled marijuana. Defendant never denied ownership of the box, nor did he deny that he used it as paraphernalia. All of these circumstances and actions of Defendant point to the conclusion that he intended for this box to be used as drug paraphernalia, namely to store marijuana, and it is clear that at some time it was used for this purpose.

When viewing all of the evidence in the light most favorable to the jury's verdict, it is evident that the jury was correct in determining that Defendant constructively possessed the box and that he intended to use it for the storage of marijuana. Defendant's argument on this issue fails and his conviction for possession of drug paraphernalia in a drug free zone should be affirmed by this Court.

POINT III

DEFENDANT WAS PROPERLY CONVICTED OF INTERFERENCE WITH AN OFFICER MAKING A LAWFUL ARREST OR DETENTION

Defendant's last argument is that his conviction for interference with an officer should be reversed. It is difficult to tell from Defendant's brief if he is arguing that the evidence was insufficient to convict him, or if he is arguing that as a matter of law, he could not be convicted because he had not been told that he was under arrest at the time of his struggle with

the officers. In any event, either argument is without merit.

Utah Code Ann. § 76-8-305 (1953 as amended) states:

> A person is guilty of a class B misdemeanor if he has knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by:
>
> (1) use of force or any weapon;
>
> (2) the arrested person's refusal to perform any act required by lawful order:
>
> (a) necessary to effect the arrest or detention; and
>
> (b) made by a peace officer involved in the arrest or detention; or
>
> (3) the arrested person's or another person's refusal to refrain from performing any act that would impede the arrest or detention.

The jury was properly instructed on this offense. According to the statute, a person can interfere with his own arrest or detention by the use of force, or his refusal to perform any act required by lawful order necessary to effect the arrest or detention and made by a peace officer involved in the arrest or detention. The evidence presented at trial showed that Defendant was ordered by the officers on several occasions to stop reaching under the seat and show his hands. The officers were concerned that Defendant might be reaching for a weapon. When Defendant did not comply, the officers physically pulled him out of the truck and attempted to handcuff him. Defendant struggled and fought with the officers, who continually told him to stop struggling. The officers eventually placed handcuffs on Defendant and he continued to struggle even after being handcuffed.

Clearly, the evidence presented at trial was sufficient to show that Defendant used force to interfere with his own arrest or detention. There is no requirement that Defendant be told that he is under arrest prior to his interference in order to be convicted, as Defendant argues. Rather, the State need only show that Defendant knew or should have known that police officers

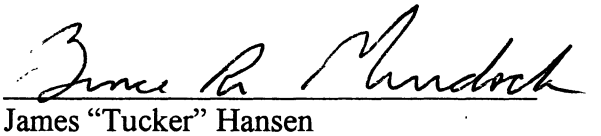
were seeking to effect a lawful arrest or detention of himself. The evidence clearly showed that he had such knowledge and the jury properly convicted him of this offense. No basis for reversal exists on this point of argument and Defendant's conviction for interference with an arrest should be affirmed.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing, Defendant's convictions for Possession of Drug Paraphernalia in a Drug Free Zone and Interference With an Officer Making an Arrest should be affirmed.

RESPECTFULLY SUBMITTED this 12 day of October, 2000.

DUVAL HANSEN WITT & MORLEY, P.C.

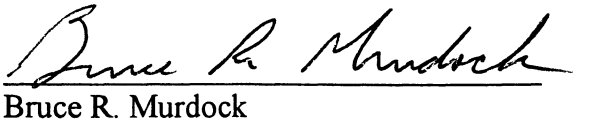


James "Tucker" Hansen
Bruce R. Murdock
Attorneys for Plaintiff/Appellee

MAILING CERTIFICATE

I certify that I sent by U.S. Mail, postage prepaid, two true and correct copies of the foregoing Brief of Appellee this 12 day of October, 2000 to the following:

L. Ronald Jorgensen
Attorney at Law
12116 Aspen Ridge Road
Sandy, Utah 84094



Bruce R. Murdock